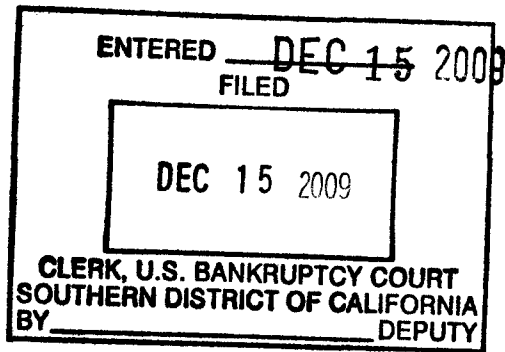


1
2
3
4
5
6 **NOT FOR PUBLICATION**



7
8 **UNITED STATES BANKRUPTCY COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 **In re**

12 **ROBERT and MARY-ANN**
13 **SCHANEMAN,**
14 **Debtors.**

Case No. 08-07044-B13

MEMORANDUM DECISION

15
16 **I.**

17 **INTRODUCTION**

18 The chapter 13 trustee ("Trustee") moved pursuant to § 1329 to modify the
19 chapter 13 plan of debtors ("Plan"), Robert and Mary-Ann Schaneman ("Debtors")
20 to extend the plan length from 35 months to 36 months, and to increase the
21 dividend to general unsecured creditors from 0% to 15% or a pro rata share of
22 \$15,000, whichever is greater ("Modified Plan"). The reason for the modification
23 is that the real property secured creditors withdrew their claims, and the Plan will
24 be completed in only 15 months. It is undisputed that the Debtors have no
25 "disposable income" under current law.¹ However, the Debtors' Schedules "I" and
26

27
28 ¹ In 2005, Congress overhauled the Bankruptcy Code's definition of "disposable income" through the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8 (2005), effective in cases commenced on or after October 17, 2005. Amended § 1325(b)(2) defines "disposable income" to mean the debtor's

1 “J” reflect that they actually have positive net monthly income of \$720.00 which
2 they agreed to pay to their Plan for a period of 35 months.

3 The Trustee argues that the Court must treat this motion to modify the Plan
4 to increase the payments the same as it would treat a motion to modify the Plan to
5 reduce the payments. He urges that the Court would routinely modify the Plan to
6 reduce the payments below the amount required by the disposable income test if
7 the Debtors’ post-confirmation financial circumstances negatively changed.
8 Similarly, the Court must modify the Plan to increase the payments where the
9 Debtors’ post-confirmation financial circumstances enable the Debtors to pay
10 more to their general unsecured creditors than they agreed to pay.

11 The Debtors object to the Modified Plan. They argue that *In re*
12 *Kagenveama*, 541 F.3d 868, 875-77 (9th Cir. 2008) holds that there is no
13 minimum “applicable commitment period”² for their Plan since they have no
14 projected disposable income. They object to being forced to continue paying
15 \$720.00 for the full 35 months (or 36 months as the Trustee has requested), if their
16 changed post-confirmation financial circumstances allow them to complete their
17 Plan in only 15 months.

18 Having had the opportunity to review the case law and having duly
19 considered the arguments of counsel, the Court grants the motion but limits the

21 “current monthly income” – as rigidly defined by new § 101(10A) – less the expenses set forth in
22 new §§ 1325(b)(2) or (b)(3), which apply depending on whether the debtor’s “current monthly
23 income” is above or below the applicable state family median income. Under BAPCPA, the
24 Debtors have no “disposable income” even though they have \$720.00 in monthly net income.

25 ² The phrase “applicable commitment period” is another new term added to § 1325(b)
26 by BAPCPA. Amended § 1325(b)(1)(B) replaced the minimum “three year” plan period with the
27 term “applicable commitment period,” which is defined in new § 1325(b)(4) to be three years, or
28 five years if the debtor’s “current monthly income” is above the applicable state family median
income. However, in the Ninth Circuit the minimum “applicable commitment period” in
§ 1325(b)(1)(B) is *inapplicable* to a debtor with no “disposable income.” *Kagenveama*, 541 F.3d
at 875-77.

1 Modified Plan length to 35 months.

2 **II.**
3 **ISSUE**

4 Under § 1329(a), may the Court modify a plan of reorganization to increase
5 the amount paid to unsecured creditors and extend the time for such payment to 36
6 months even though the debtor has no “projected disposable income” and no
7 minimum “applicable commitment period” under § 1325(b)?

8 **III.**
9 **FACTS**

10 The Debtors filed their voluntary chapter 13 petition on July 29, 2008. Their
11 bankruptcy petition Schedules “I” and “J” listed monthly income of \$4,772.53 and
12 monthly expenses of \$4,051.58, yielding total monthly net income of \$720.95.
13 [D.E. # 11] The Debtors’ Form B22C lists “current monthly income” of \$2,594.53
14 because, pursuant to new § 101(10A), the term “current monthly income” *excludes*
15 their Social Security income.³ [D.E. # 12] Lines 12-17 of the Debtors’ Form
16 B22C reflect annualized “current monthly income” of \$31,134.36, placing them
17 below the \$61,742 applicable median family income for a family of two in
18 California. Because their Form B22C reflects that they have below median
19 income, Line 23 of Form B22C provides that the Debtors were *not* required to
20 utilize § 1325(b)(3) – which incorporates the “means test” in § 707(b) – to
21 calculate their expense deductions and their “disposable income.” Instead, the
22 Debtors could utilize their Schedule “J” expenses to calculate their monthly
23 expenses and their “disposable income,” but under current law, these expenses
24 must be deducted from their “current monthly income” listed on Form B22C
25 instead of from their *actual* monthly income listed on Schedule “J.” *See* 11 U.S.C.
26 § 1325(b)(2). Accordingly, the Debtors have fictitious negative “disposable
27

28 ³ The Debtors receive \$2,518 in monthly Social Security income. [*See* Schedule “I”]

1 income” of \$1,457.05 even though they have positive net monthly income of
2 \$720.95.

3 The Debtors’ Plan dated August 12, 2008 proposed to pay \$720.00 monthly
4 to the Trustee for payment of:

5 ¶ 3 – Administrative claims including statutory trustees fees;

6 ¶ 6 – Personal property secured claim of Wells Fargo estimated to be
7 \$5,831.87;

8 ¶ 9 – Real property secured claims estimated to be \$1,400 owed to the
9 County of San Diego Tax Collector for real property taxes (Dan
10 McAllister), and mortgage arrearages estimated to be \$10,000 owed to First
11 Federal Savings⁴; and

12 ¶ 13 – 0% to general unsecured creditors. However, because the percentage
13 amount was filled in at less than 100% and the dollar amount was left blank,
14 this paragraph provides that the Trustee is authorized to increase the
15 percentage, if necessary, to comply with the required applicable
16 commitment period.

17 Additionally, ¶ 19 of the Plan proposed that the Debtors would file an adversary
18 proceeding to avoid the second mortgage held by Countrywide Home Loans on
19 the Debtors’ principal residence pursuant to § 1322, contingent upon the Debtors’
20 success in the adversary proceeding and completion of their Plan.⁵ [D.E. # 13]

21 The Trustee objected to confirmation of the Plan for several reasons,
22 including the failure to report all sources of § 101(10A) income and failure to
23

24 ⁴ Pursuant to Proof of Claim No. 5 filed September 12, 2008, the secured creditor is First
25 Federal Bank of California (“First Federal”).

26 ⁵ The Debtors filed a valuation motion in lieu of an adversary proceeding as authorized by
27 *In re Pereira*, 394 B.R. 501 (Bankr. S.D. Cal. 2008). That motion was granted and an order
28 avoiding the lien was entered on December 18, 2008, contingent upon confirmation and
completion of the Plan. [D.E. # 41]

1 apply all “projected disposable income” for a period of not less than three years.
2 [D.E. # 19] These issues were resolved, and the Plan was confirmed by order
3 entered January 28, 2009. [D.E. # 47] Although the language in the Plan suggests
4 a length of 36 months, it is undisputed that the Plan runs 35 months.

5 In May 2009, First Federal filed a motion for relief from stay alleging, *inter*
6 *alia*, that the Debtors had not made any postpetition mortgage payments. [D.E.
7 # 57-58] The Debtors did not contest the motion, and an uncontested order was
8 entered on June 9, 2009. [D.E. # 59] Although the record is unclear, it appears
9 that First Federal may have informally withdrawn its proof of claim as result of the
10 order lifting the stay. Additionally, the record reflects that on September 4, 2009,
11 the Trustee noticed his intent to reconsider and reallocate First Federal’s Claim No. 5
12 in the reduced amount of \$547.45, most likely because this is the amount of
13 arrearages the Trustee had already paid to First Federal. [D.E. # 67] Because First
14 Federal did not timely object to the Trustee’s notice of intent, Claim No. 5 is now
15 reallocated in the reduced amount. Further, the County of San Diego Tax Collector
16 has withdrawn Claim No. 7 for \$836.41 in property taxes. [D.E. # 64] Therefore,
17 although it is not expressly stated in the Trustee’s motion, it appears that Wells
18 Fargo is the sole remaining secured creditor to be paid.

19 On September 28, 2009, the Trustee filed his motion to approve the
20 Modified Plan dated September 25, 2009. The Modified Plan is identical to the
21 Plan except for ¶ 13 and ¶ 19. Modified Plan ¶ 13 increases the 0% dividend to
22 general unsecured creditors to 15% or a pro rata share of \$15,000, whichever is
23 greater. Modified Plan ¶ 19 still provides for a lien strip of the wholly unsecured
24 second trust deed, but identifies two secured creditors who appear to be strangers
25 to this case.⁶ The Trustee’s declaration in support of his motion indicates: “Real
26

27 ⁶ Modified Plan ¶ 19 appears to be an erroneous cut and paste from a plan proposed in a
28 different chapter 13 case.

1 estate creditors withdrew claims and plan is only 15 months in length at 0%.”

2 [D.E. # 71] The Trustee’s motion does *not* state that the Modified Plan is 36
3 months in length. At the hearing on the motion, the Trustee stated that the
4 Modified Plan is 36 months in length.

5 The Debtors acknowledge their confirmed Plan was projected to run 35
6 months in length, but it will likely be completed in 15 months. [D.E. # 72] The
7 Debtors contend they cannot be forced to continue to pay into their Plan for the
8 entire 35 months (or 36 months) because they have no “disposable income” and no
9 “applicable commitment period” for their Plan.

10 IV.

11 DISCUSSION

12 The Court must decide whether it should grant the Trustee’s motion to
13 modify the Plan to increase the dividend to the class of general unsecured creditors
14 and to extend the length to 36 months even though the Debtors have no disposable
15 income to pay into their Plan, and there is no minimum applicable commitment
16 period requirement for this Plan. Bankruptcy Code § 1329 governs modification
17 of a plan after confirmation. Section 1329(a) provides that a plan may be modified
18 at any time after confirmation but before completion of such payments under the
19 plan, for any of the following reasons:

- 20 (1) to increase or reduce the amount of payments on claims of a particular
21 class provided for by the plan;
- 22 (2) to extend or reduce the time for such payments;
- 23 (3) to alter the amount of the distribution to a creditor whose claim is
24 provided for by the plan to reflect payments outside the plan; or
- 25 (4) if appropriate, to reduce the amounts to be paid under the plan by the
26 actual amounts the debtor expends to obtain health insurance.

27 Section 1329(b)(1) specifies the provisions that apply to post-confirmation plan
28 modifications. Specifically, § 1329(b)(1) specifies that §§ 1322(a), 1322(b) and

1 1323(c) of this title, and the requirements of § 1325(a) of this title, apply to
2 modifications of a plan under § 1329(a). This section does not, however,
3 incorporate any of the requirements of § 1325(b) of this title to post-confirmation
4 plan modifications. As such, there is no express requirement in § 1329(b)(1) that
5 the disposable income test must be satisfied to approve a post-confirmation plan
6 modification.

7 This Court has previously reviewed the effect of omitting the disposable
8 income test from § 1329(b)(1) in *In re Sounakhene*, 249 B.R. 801 (Bankr. S.D.
9 Cal. 2000). The Court relied upon the plain language of § 1329(b)(1) to join the
10 courts that hold the disposable income test in § 1325(b) is not implicated under a
11 strict reading of § 1329(b)(1). *Sounakehene*, 249 B.R. at 805. We reasoned that
12 the better approach is to utilize components of the disposable income test as a
13 factor weighing upon the Court's overall judgment and discretion to approve the
14 modified plan. *Id.* at 805.

15 The holding of *Sounakehene* was adopted by the Ninth Circuit Bankruptcy
16 Appellate Panel ("BAP") in *In re Sunahara*, 326 B.R. 768, 781-82 (9th Cir. BAP
17 2005). The BAP reviewed the competing views and held that the disposable
18 income test in § 1325(b) is not implicated by a strict reading of § 1329(b)(1),
19 except as a factor in determining the good faith of the plan modification.
20 *Sunahara*, 326 B.R. at 782. Although Congress has since overhauled many parts
21 of the Bankruptcy Code through BAPCPA, Congress did not amend § 1329(b)(1).
22 The BAP has affirmed that its holding in *Sunahara* continues to apply in cases
23 subject to BAPCPA. *In re Fridley*, 380 B.R. 538, 543-44 (9th Cir. BAP 2007).

24 Notwithstanding the above precedents, the Debtors focus on the disposable
25 income test in § 1325(b) as grounds to deny the motion. They argue the holding
26 of the Ninth Circuit Court of Appeals in *Kagenveama* "compels" the conclusion
27 that they have no disposable income under § 1325(b) and, therefore, have no
28 prescribed minimum applicable commitment for their Plan. The Debtors' position

1 is that their plan payments are voluntary, and they could have proposed as short of
2 a plan as they wanted.⁷ They contend that *Kagenveama* “compels” that the Court
3 must leave the Plan as confirmed even though they will complete it in only 15
4 months.

5 It is difficult to understand how the disposable income test in § 1325(b)
6 “compels” that there can be no forced modifications to their Plan since there is still
7 no requirement in § 1329 to satisfy § 1325(b). *Fridley*, 380 B.R. at 543-44. More
8 troubling is the fact that *Kagenveama* stressed its holding does *not* apply to § 1329
9 plan modifications:

10 We stress that nothing in our opinion prevents the
11 debtor, the trustee, or the holder of an allowed
12 unsecured claim to request modification of the plan after
13 confirmation pursuant to § 1329. Here, we are dealing
14 with the plan confirmation requirements of § 1325, not
15 plan modification pursuant to § 1329. Another section of
the Bankruptcy Code governs modification of a plan
before confirmation. 11 U.S.C. § 1323. Because
Congress directly addressed the modification of plan in
other sections, we need not transform § 1325 into a plan
modification tool.

16 *Kagenveama*, 541 F.3d at 877. Since *Kagenveama* did not apply its holding to
17 § 1329 plan modifications, it certainly cannot “compel” denial of this motion.

18 The Debtors have proffered no other arguments in support of their
19 opposition. However, the Court has an independent duty to review the Modified
20 Plan to determine if it meets the applicable confirmation requirements, including
21 good faith. *See* § 1329(b)(1) which incorporates § 1325(a)(3); *see also In re*
22

23
24 ⁷ *See* Opposition at 2:10-17 quoting from *Kagenveama*’s dissent as follows:

25 The majority lays down a rule: So long as the debtor can calculate
26 no “disposable income” at the time his creditor plan is confirmed,
27 he can rest easy. The debtor can propose as short a time period as
he wants: a day, a week, or a month.

28 *Kagenveama*, 541 F.3d at 877 (quotation marks in original). [D.E. # 72]

1 *Warren*, 89 B.R. 87, 90 (9th Cir. BAP 1988) (in order to confirm a plan,
2 § 1325(a)(3) provides that the bankruptcy court must find that it has been
3 proposed in good faith). Good faith is not statutorily defined. Instead, a court
4 must make a factual determination of whether a plan has been proposed in good
5 faith based on the totality of the circumstances. *In re Goeb*, 675 F.2d. 1386, 1390-
6 91 (9th Cir. 1982).

7 In *Goeb*, the Ninth Circuit directed that the proper inquiry is whether the
8 plan proponent “acted equitably” in proposing the plan. *Goeb*, 675 F.2d at 1390.
9 This “acted equitably” analysis considers whether the plan proponent has
10 misrepresented facts in the plan, unfairly manipulated the Bankruptcy Code, or
11 otherwise proposed the plan in an inequitable manner, taking into account “all
12 militating factors” in a manner that equates with the totality of the circumstances.
13 *Id.* at 1390-91; *see also Fridley*, 380 B.R. at 543 (looking to *Goeb* in a case
14 subject to BAPCPA for the Circuit’s long-settled interpretation of the good faith
15 confirmation requirement).

16 Thus, the Court must review the Modified Plan to determine whether the
17 Trustee has “acted equitably” in proposing the Modified Plan. The Trustee is not
18 acting equitably if he is attempting to achieve through the Modified Plan an unfair
19 manipulation the Bankruptcy Code, or if he has otherwise proposed the Modified
20 Plan in an inequitable manner. *See Goeb*, 675 F.2d at 1390; *Fridley*, 380 B.R. at
21 543. If, for example, the Trustee always intended to bring this § 1329 motion to
22 modify the Plan to increase the payment and extend the length to circumvent
23 *Kagenveama*’s interpretation of § 1325(b), this stratagem would plainly be an
24 unfair manipulation of the Bankruptcy Code, which is a factor named in *Goeb* as
25 being indicative of bad faith. As *Fridley* explained:

26 The existence of the controlling *Goeb* test of
27 § 1325(a)(3) good faith means that [the BAP in]
28 *Sunahara* did not inadvertently license circumvention
of § 1325(b) by the ploy of confirming a plan that
complies with § 1325(b) [disposable income test] and

1 then promptly modifying the plan in a manner that does
2 not comply with § 1325(b). Such a stratagem plainly
3 would be unfair manipulation of the Bankruptcy Code,
4 which is a factor named in *Goeb* as indicative of a plan
proponent not acting equitably and, hence, not in good
faith. [Citation omitted.]

5 *Fridley*, 380 B.R. at 543. Accordingly, the Court cannot (and will not) approve
6 the Modified Plan if it finds the Trustee always intended to modify the Plan to
7 circumvent § 1325(b).

8 In the present case, there is no evidence suggesting the Trustee always
9 intended to modify the Plan to circumvent § 1325(b). Rather, the Trustee brought
10 this motion in response to the Court's order entered post-confirmation granting
11 relief from stay to First Federal, which reduced the amount of secured claims to be
12 paid through the Plan. The Trustee seeks to assure that the Debtors pay their
13 \$720.00 in monthly net income toward repayment of their creditors for the agreed
14 upon length of 35 months. The Trustee correctly anticipated that the Debtors have
15 no intention of paying for the full 35 months. The Debtors contend that all
16 payments under their Plan will be completed in 15 months. The Court does not
17 reach the issue of whether the Debtors' position is legally correct.⁸

18 The proper focus is on whether the Trustee's motive in proposing the
19 Modified Plan is well-intentioned under the totality of the circumstances. This
20 totality of the circumstances test is easily met. There is nothing unfair,
21 manipulative or inequitable about holding the Debtors to their agreed plan period
22 of 35 months. In exchange for making 35 monthly payments of \$720.00, the
23 Debtors will receive a discharge of approximately \$100,000 in general unsecured
24 debts. [D.E. # 11]

25
26
27 ⁸ Arguably, the 35 month length cannot be shortened without a proper § 1329 motion to
28 modify the Plan to decrease its length. See *Fridley*, 380 B.R. at 544-45. The Debtors have not
brought such a motion.

However, the Court cannot discern a good faith reason to extend the Plan length from 35 months to 36 months. Extending the Plan for one more month to collect \$720.00 will not yield a meaningful increased dividend to general unsecured creditors. The one month extension appears to be a poorly veiled attempt to use § 1329 to circumvent § 1325(b). The Debtors proposed a 35-month plan length in good faith. The Trustee may not agree with *Kagenveama*'s interpretation of § 1325(b), but it is not appropriate to use § 1329 to circumvent it.

V.

CONCLUSION

The Court grants the motion to modify, in part, based upon its finding that the Trustee has proposed the Modified Plan in good faith. The Modified Plan shall increase the dividend to general unsecured creditors from 0% to 15%, or a pro rata share of \$15,000, whichever is greater. The Modified Plan length shall remain 35 months. Further, ¶ 19 of the Modified Plan needs to correctly identify the junior secured creditor. The Trustee shall prepare and lodge an order in accordance with this Memorandum Decision within ten days of its entry.

Dated: 15 Dec 09


LOUISE DE CARL ADLER, Judge